IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1503

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
Appellants

v.

THE WICHITA BOARD OF TRADE, et al.,
Appellees

On Appeal From The United States District Court
For The District of Kansas

MOTION TO AFFIRM

CHARLES J. McCARTHY
DANIEL J. SWEENEY
Belnap, McCarthy, Spencer,
Sweeney & Harkaway
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Attorneys for Appellees,
WICHITA BOARD OF TRADE, *et al.*

May 27, 1977

DI CESARE - Printing — 331-6101 — Washington, D.C. 20006

INDEX

TABLE OF CASES

STATUTES CITED

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1503

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
Appellants

v.

THE WICHITA BOARD OF TRADE, et al.,
Appellees

On Appeal From The United States District Court For The District of Kansas

MOTION TO AFFIRM

Pursuant to Rule 16(1) of the Rules of this Court, Appellees Wichita Board of Trade, *et al.*, move that the judgment of the lower court in this case be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

1. Was the three-judge District Court's Order, which was issued pursuant to the instruction of this Court, within its jurisdiction and therefore subject to this Court's jurisdiction on direct appeal?

2. Was it permissible for the District Court to order that the amounts collected during this Court's stay be distributed in accordance with equitable principles?

STATEMENT

This case arose out of an attempt by the Appellant railroads to impose a separate charge for a stop for in-transit inspection of grain, without a corresponding reduction in the line-haul rates. It was conceded throughout the case that compensation for such service was already included in the existing line-haul rates. The railroads' proposal was to charge twice for the same service. The theory of their case was that the charge was to be a penalty to discourage inspections and thereby enhance car supply. In that vein, they asserted throughout the proceedings–both before the Commission and in court–that they did not desire to collect "one penny" of such charges. Nevertheless, during the litigation the charges were in effect for 3 years and a total of $11,000,000 was collected by the railroads. The subject of this appeal is an order of the District Court, acting pursuant to an instruction of this Court, that they refund to shippers the approximately $3,000,000 collected during the one-year period of this Court's Stay.[1]

At the outset of the case the Interstate Commerce Commission suspended the proposed charges and instituted an

[1] Inasmuch as Appellants did not append it to their Jurisdictional Statement, the Stay of this Court is reproduced as Appendix A hereto.

investigation, at the conclusion of which it found that the charges were just and reasonable.[2] A statutory three-judge court set aside the Commission's order, remanded the matter to the Commission, and ordered the charges suspended unless and until otherwise ordered by that court.[3] The railroads immediately applied to this Court for a stay in order to keep the charges in effect. A stay was then granted by this Court, but subject to these conditions:

> (2) That, as a condition of the foregoing stay, each railroad collecting in-transit grain inspection charges under the challenged tariffs shall immediately take steps, including publication of appropriate provisions in applicable tariffs, to do the following:
>
> (a) keep accurate accounts in detail of all amounts hereafter received during the existence of the stay by reason of in-transit grain inspection charges, specifying by whom and in whose behalf such amounts are paid; and
>
> (b) in the event the order suspending the charges is affirmed by this Court, refund (with interest) of such amounts to persons in whose behalf such amounts were paid, without the

[2] The decision of the Commission is reported at 340 I.C.C. 69 (1971). After an earlier interim decision favorable to the railroads had been issued by Division 2 of the Commission (339 I.C.C. 304 (1971)), the railroads elected to place the inspection charges into effect.

[3] *Wichita Board of Trade v. U.S.*, 352 F.Supp. 365 (D.Kan. 1972).

> necessity for such persons to make applications for refunds. In the event this Court's action should be other than an affirmance of the results reached by the district court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may deem appropriate.

In *Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973), this Court affirmed the decision of the District Court insofar as it set aside the Commission's order but held that, in view of the grounds on which the order was set aside and the failure of that court to consider the issue of irreparable injury, it had erred in ordering the charges suspended. The plurality opinion of this Court, by Mr. Justice Marshall, gave the following instruction as to the disposition of the inspection charges collected during the stay:

> We have previously stayed the judgment of the District Court on condition that appellant railroads keep accounts of the amounts received from the in-transit charges., 409 U.S. 801 (1972). We hereby direct the District Court to enter an order, consistent with this opinion, regarding the disposition of those amounts. (412 U.S. at 802, fn. 1)

The District Court subsequently remanded the case to the Commission for further proceedings on the merits. The Commission then instructed the parties to file briefs addressed to the question of "the proper course of action for the Commission now to undertake in this proceeding." The Commission listed alternatives, including reopening of the case for the purpose of receiving additional evidence. The railroads rejected this suggestion and the Commission reconsidered its

earlier decision on the basis of the same record. On reconsideration, it held that:

> ...the imposition of proposed new charges for the first stop for in-transit inspection of grain at various points in the United States outside the eastern territory has not been shown to be just and reasonable and otherwise lawful. (Jurisdictional Statement, App. B12)

Following that decision by the Commission, Plaintiffs filed a motion in the District Court for an order requiring refunds. The three-judge Court granted the motion and entered the judgment from which this appeal is taken.

ARGUMENT

I.

The Jurisdictional Question Is Insubstantial

The question raised by Appellants as to the jurisdiction of the statutory three-judge court to consider the motion for refunds is somewhat surprising in view of the fact that they took the position in the District Court that all three judges should rule on the refund motion inasmuch as it was acting pursuant to this Court's instruction on remand to a three-judge court. In any event, the question is not a substantial one. The rationale of *United States v. I.C.C.*, 337 U.S. 426, and *Public Service Commission v. Brasheer Freight Lines*, 312 U.S. 621, that a three-judge court is inappropriate where the issue relates only to the payment of money would not seem to apply to a situation in which a decision of a properly constituted three-judge court has been reviewed by this Court; and the case has been remanded to the same Court with instructions to take further action.

Moreover, the jurisdictional question becomes of importance only if the substantive question has sufficient merit to require plenary consideration. See *Admiral Merchants Motor Freight, Inc. v. United States*, 404 U.S. 802, *rehearing denied* 404 U.S. 987, which involved a Commission order requiring the Plaintiffs to make refunds. In that case, the United States moved to dismiss the appeal on the ground that the case should have been passed on by a single judge and, therefore, this Court had no jurisdiction of a direct appeal. The Motion to Dismiss was combined with an alternative motion to affirm. This Court granted the Motion to Affirm, thus denying the Motion to Dismiss *sub silentio*. That is the procedure which should be followed in this case. In any event, the jurisdictional question is of no precedential importance since new actions involving Commission decisions may no longer be brought before three-judge courts and review of Commission orders must now be brought in the Court of Appeals pursuant to 28 U.S.C. § § 2341-2353.

II.

The Question as to the Merits of the District Court's Order Is Insubstantial

Appellants concede, as they must, that this Court directed the District Court to decide upon the disposition of the inspection charges collected during the period of this Court's stay. The District Court, in determining the disposition of the amounts so collected, sat as a court of equity and was required to order the disposition of those funds in accordance with equitable principles. Appellants do not contend that the District Court failed to follow equitable principles in ordering that the funds be refunded to the shippers. Their complaint is that the District Court *did* order disposition of the funds in accordance with equitable

principles. They contend that the District Court lacked jurisdiction to determine how the funds should be distributed, despite the express direction from this Court that it make such a determination. This contention is wholly without merit.

It was this Court which specifically directed the District Court to make an appropriate disposition of the funds collected during the Stay. Thus, the order of the District Court ruling on the refunds was simply in response to this Court's directions and in no sense was an excursion of its own. What appellants are here seeking is to frustrate the very purpose of this Court in delegating the equitable functions involved to the District Court.

Appellants argue that the equitable function as to refunds should not have been delegated to the District Court but rather should have been referred to the Commission. There was nothing in this Court's Stay or in its instruction delegating the refund function to the District Court which in any way suggested that there would have to be a secondary delegation to the Commission to rule on the refunds under the Stay. Had this Court so intended, it would have so specified.

A court reviewing an agency order sits as a court with equity powers and "may adjust relief to the exigencies of the case in accordance with the equitable principles governing judicial action". *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939). It is well-settled that such a reviewing court has the equitable powers to make disposition of funds collected by the parties as an incident to the issuance of injunctive relief

or a stay related thereto.[4] The instant case is controlled by the *Morgan* cases. There, the Secretary of Agriculture had declared a schedule of rates for the services of the Kansas City stockyard companies to be unlawful and had prescribed a lower schedule of rates. The stockyard companies obtained injunctive relief from the district court, which temporarily restrained the Secretary's order on condition that the stockyards deposit the difference between the existing rates and the rates prescribed by the Secretary. In *Morgan v. United States*, 304 U.S. 1, this Court set aside the Secretary's order on the ground that the companies had not received a full hearing. This Court ruled:

> The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. *These questions are appropriately for the District Court* and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. (304 U.S. 1, 26) (emphasis supplied).

---

[4] Appellants' citation of *Arrow Transportation Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963) and *Moss v. C.A.B.*, 521 F.2d 298 (D.C. Cir. 1975), cert. den. 424 U.S. 966 (1976), as support for their argument that the District Court lacked the power to order refunds under the Stay is misplaced. *Arrow* involved only the injunctive power of a court while the agency's proceedings were still underway; and in *Moss* the fares were found just and reasonable by the C.A.B. in its final decision on remand, the exact opposite of the situation here. *Moss*, p. 300.

On remand, the district court granted a motion by the stockyard companies to distribute the funds among them. In *United States v. Morgan*, 307 U.S. 183 (*Morgan II*), this Court reversed, stating that:

> ...in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 373; Inland Steel Co. v. United States, 306 U.S. 153; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles. (pp. 190-91)

Morgan II then laid down the guidelines to be followed by the district court in deciding who was equitably entitled to the funds. It ruled that the district court must await the determination by the Secretary of Agriculture on remand as to whether the rates were just and reasonable and be guided by that determination.

The similarities between *Morgan II* and the instant case are such that it is directly in point. There, as here, it was contended that the agency could prescribe rates only for the future in the investigation proceeding. There, too, there was also an available complaint procedure under which reparations could be granted, similar to the § 13(1) procedure to which Appellants would remit shippers. (307 U.S. 183, at 190-193). But this Court held that the equitable distribution by the

district court need only await the decision by the Secretary as to reasonableness in the remanded proceeding.

In accordance with *Morgan* these shippers here delayed the filing of a motion for refunds until the determination as to justness and reasonableness had been made by the commission on remand. Once that determination was made, the District Court had all the guidance it needed to decide how the funds accumulated during the Stay should be distributed. Nonetheless, it is the thrust of Appellants' argument that, after waiting the two years for the Commission's final decision on remand as to the reasonableness of the charges, it is now necessary to go back to the Commission for another decision as to the reasonableness of these same charges. They suggest that the shippers would have to file individual complaints with the Commission under Section 13(1) of the Interstate Commerce Act because otherwise the court assertedly lacks the power to order refunds for the period of the Stay.

The finding of unlawfulness in the Commission's final Report and Order on remand is framed in terms of "not shown to be just and reasonable". That is the standard finding made by the Commission in all cases under § 15(7) of the Act where the carriers have failed in their case. Thus, Appellants failed to carry their burden as to the justness and reasonableness of the charges, even after being offered a second opportunity by the Commission to present further evidence after remand. Appellants urge that, as a prerequisite to the District Court's distributing refunds for the period of the stay, the shippers must file Section 13(1) complaints with the Commission and, in such proceedings, produce evidence to establish the unjustness and unreasonableness of the charges. But a judgment against the party with the burden of proof becomes *res judicata* and he is not entitled to another

opportunity to litigate the question.[5] This principle is equally applicable to those administrative determinations which are made, as here, after full administrative hearings, *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966); *Painters Dist. Counc. No. 38 v. Edgewood Contracting Co.*, 416 F.2d 1081 (4th Cir. 1969). Thus, the shippers are not required to jump through an additional series of new and expensive hoops at the Commission before the District Court may distribute the funds collected during the Stay.

Appellants appear to concede that the finding by the Commission that the charges were "not shown just and reasonable", is the equivalent of "unreasonable", but they argue that the Commission's finding related only to charges for the future.[6] But, there was no reopening of the evidentiary record after remand, so the finding would have to speak as of the closing of the record in the first phase of the case, *i.e.*, long prior to the stay period.

In any event, Appellants' argument that the Commission's finding here as to unreasonableness does not apply to shipments made during the proceedings is untenable in the light of established norms. The Commission has held, as to an identical finding made in a similar investigation proceeding, that it was binding as to the unreasonableness of

---

[5] *Partmar v. Paramount Pictures*, 347 U.S. 89, 90 (1954); *United States v. Silliman*, 167 F.2d 607, 617 (3rd Cir.); Restatement, Judgments (1942) Secs. 1-3, and comments thereunder.

[6] "There is, indeed, no difference between a Commission finding that rates are "unreasonable" and a Commission finding that rates are "not shown to be just and reasonable" in terms of whether the rates may lawfully be maintained *in the future.*" (Jurisdictional statement, p. 15)

rates which went into effect prior to the administrative decision. *Flores v. Texas & N.O. R. Co.*, 316 I.C.C. 440 (1962). The Commission there rejected the suggestion that there was an open issue as to whether the charges were unreasonable for the period during the proceeding:

> While there was no order in the investigation requiring the respondents to maintain records in the nature of those referred to above, there can be no doubt in such a proceeding, where the ultimate determination of maximum reasonableness is made after the termination of the suspension period, the findings may be applied retroactively to the effective date of the assailed rate or charge, and that in a subsequent complaint proceeding claiming reparation based on such findings, the submission of additional evidence of the unlawfulness of the particular rate or charge is not necessary. The defendant's contention that the approval of the $25 charge was solely a prescription for the future ignores the fact that it was tantamount to a finding that any charge in excess thereof assessed after the expiration of the suspension period, was unlawful. (p. 442)

Here, as of the time of this Court's decision remanding the case to the Commission, it was not yet known whether the Commission's ultimate decision would uphold the charges. But the Commission has since issued such decision. Accordingly, it was then permissible for the District Court to carry out this Court's instruction to distribute the funds equitably. That the shippers paid unlawful charges for an in-transit inspection service for which they had already paid in the basic rate is all the equity needed to support the judgment of the District Court. No more was shown in *Morgan II*.

What Appellants' argument boils down to is that the District Court cannot distribute the funds to the shippers unless and until each of the thousands of shippers files a complaint and proves that the charges were unreasonable on each particular shipment made. Appellants would leave shippers in the same position they would have been in if the stay order had not been granted, *i.e.*, resort to a complaint remedy under § 13(1) of the Act. Such a reading is entirely inconsistent with the Stay Order. In a § 13(1) complaint proceeding shippers would have to take on the burden of proving every shipment that took place, every transit stop, and the amount paid for each of them, all to collect a refund of only $16.00 per car. In effect, this would provide a remedy for only the most sophisticated shippers which are able to retrieve the necessary records and present the type of proof necessary to prevail in a § 13(1) complaint case. And even for such successful shippers the administrative and litigation costs could easily equal or exceed the amount of prospective refunds.[7]

In contrast, the Stay order required the railroads to keep accurate accounts of all amounts received by reason of in-transit grain inspection charges and to pay those amounts to the persons in whose behalf they were paid "without the necessity for such persons to make applications for refunds".

---

[7]Notably, though the refunds under the Stay cover only one year of the three years during which the railroads collected these charges, the shippers have not filed complaints for the other two years, evidently concluding that the only economically feasible refunds are those to which they are entitled under the Stay.

The purpose of the Stay Order was to relieve shippers of the burden of record-keeping, retrieval and proving individual complaint cases before the Commission for tens of thousands of inspection charges collected during the Stay. If the District Court had held, as Appellants suggested, that the shippers were required to file and prove individual § 13(1) cases before the court could equitably order the funds distributed, this would have rendered the refund provisions of the Stay completely meaningless as that alternative was available under the statute in any event. Moreover, the two-year statute of limitations for filing complaints has long since passed for the shippers, so what Appellants are really arguing is that no money can be refunded to the shippers under the Stay.

Ironically, Appellants would rely upon the recent bankruptcy of the Rock Island Railroad and the asserted marginal financial position of a few other midwestern railroads. If, as Appellants maintain, the shippers are precluded from direct refunds through the District Court under the Stay Order and are relegated either to the suggested Section 13(1) complaints or to the remote possibility of Commission refunds[8] under Section 15(7), each of the

[8]The Appellant-railroads point to a glimmer of hope for shippers in that Agriculture filed a petition with the Commission asking for refunds under §15(7) and the order denying such refunds was set aside and remanded to the Commission for further explication in *Secretary of Agriculture v. Interstate Commerce Commission*, _____ F.2d _____ (D.C. Cir., 1977). The short answer to whatever argument Appellants seek to make from that case is that the §15(7) refund route was one of several alternative remedies theoretically available to obtain refunds and that the shippers elected to pursue their clear equitable remedy under the Stay rather than to take their chances on the Commission's asserted "discretion" under Section 15(7). And, assuming some vestige of hope remains that the Commission might now reverse its policy as to Agriculture's petition for refunds, it does not necessarily follow that a grant of its petition would result in refunds to these shippers.

railroads would be liable only for refunding the charges which it collected. The bankruptcy situation would then militate against collecting the substantial portion of the charges said to be due from the Rock Island. Conversely, since the Appellant railroads procured the Stay and conducted the court litigation as a group, they are jointly and severally liable to all the shippers for all the charges collected. Thus, the Rock Island bankruptcy is simply one more factor underscoring the equity and efficacy of the refund remedy afforded by this Court in the Stay Order.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted.

CHARLES J. McCARTHY
DANIEL J. SWEENEY

1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Attorneys for Appellees,
WICHITA BOARD OF TRADE, et al.

Of Counsel

BELNAP, McCARTHY, SPENCER,
SWEENEY & HARKAWAY

APPENDIX

IN THE

Supreme Court of the United States

SPECIAL TERM 1972

July 7, 1972

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL.

ORDER

On consideration of the appellants' application for stay, the appellees' reply to the application, and the affidavits and memoranda filed in support of the application and reply, IT IS ORDERED:

(1) That, subject to the conditions set forth in paragraph 2 herein, the judgment of the United States District Court for the District of Kansas entered in this matter on June 8, 1972, be and hereby is stayed pending a final determination of the appeal by this Court.

(2) That, as a condition of the foregoing stay, each railroad collecting in-transit grain inspection charges under the challenged tariffs shall immediately take steps, including publication of appropriate provisions in

applicable tariffs, to do the following:

(a) keep accurate accounts in detail of all amounts hereafter received during the existence of the stay by reason of in-transit grain inspection charges, specifying by whom and in whose behalf such amounts are paid; and

(b) in the event the order suspending the charges is affirmed by this Court, refund (with interest) of such amounts to persons in whose behalf such amounts were paid, without the neccessity for such persons to make applications for refunds. In the event this Court's action should be other than an affirmance of the results reached by the district court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may deem appropriate.